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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PROVIDENT BANK, Plaintiff and Appellant, v. JACK D. SCOTT, as Trustee, etc., Defendant and Respondent.	G032517 (Super. Ct. No. 01CC02898) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Cormac J. Carney and Richard O. Frazee, Sr., Judges. Affirmed.

Tisdale & Nicholson, Guy C. Nicholson and Michael D. Stein for Plaintiff and Appellant.

Jack D. Scott, in pro. per., for Defendant and Respondent.

In this quiet title action, Provident Bank (Provident) appeals from a judgment in favor of Jack Scott and Saddleback Investment Services, Inc. (Saddleback).[1]

[1] Provident brought numerous causes of action against Scott, Saddleback, and others. Below, we discuss Provident's claims against Scott and Saddleback as necessary. We note, Saddleback filed a cross-appeal and agreed to a proposed briefing schedule. However, Saddleback's cross-appeal was dismissed because it failed to

Provident argues: (1) substantial evidence does not support the trial court's finding Saddleback advised Provident it intended to accept a deed in lieu of foreclosure and Provident did not object to acceptance; (2) the court erroneously found Provident was estopped from challenging the validity of the deed in lieu of foreclosure; (3) the court erred in finding Saddleback's acceptance of a deed in lieu of foreclosure extinguished its interest in the property; and (4) Scott was not a bona fide encumbrancer. Because we find substantial evidence supports the court's judgment, the court correctly found Provident was estopped from contesting the validity of the deed in lieu of foreclosure, and Saddleback's acceptance of the deed in lieu of foreclosure extinguished Provident's interest in the property, we need not address the issue of whether Scott was a bona fide encumbrancer. The judgment is affirmed.

FACTS

In May of 1998, Provident and Saddleback entered into a Warehouse Loan Agreement (Agreement)[2] whereby Provident would loan money to Saddleback to fund residential mortgage loans. Saddleback would originate the loans, which were evidenced by promissory notes and secured by deeds of trust. To fund the loans, Saddleback submitted written requests to Provident. In return, Provident received a "perfected first priority security interest" in the promissory note and deed of trust. Saddleback provided Provident with the original promissory note and a certified copy of the deed of trust. Saddleback would record the deed of trust identifying itself as the beneficiary and

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designate the record pursuant to California Rules of Court, rule 5(a)(1). Saddleback has not submitted any briefs in this appeal.

[2] The Agreement states Provident is an Ohio corporation. Additionally, the Agreement states, "This Agreement shall be construed in accordance with the laws of the State of Ohio except that the provisions of this Agreement with respect to remedies regarding the Mortgages are intended to comply with the laws of the jurisdiction where such Mortgages are recorded . . . ."

execute an assignment of the promissory note and deed of trust to Provident. Saddleback was obligated to repay all principal and interest due for a loan.

Pursuant to the Agreement, in May of 1999, Provident loaned Saddleback $180,786.00 to fund a loan to James McClure. McClure's loan was evidenced by an Adjustable Rate Note and secured by a Deed of Trust on property in Lakewood, California (Property); both were dated May 26, 1999.[3] The Deed of Trust was recorded on June 9, 1999.

On June 16, 1999, Saddleback executed a Corporation Assignment of Deed of Trust (June 16 Assignment) transferring to Provident all beneficial interest in the Deed of Trust and Adjustable Rate Note. Provident did not record the June 16 Assignment at this time.

McClure never made a loan payment. In late 1999, Saddleback began foreclosure proceedings and a notice of default was recorded.

On or about February 7, 2000, William R. Parker, Saddleback's President, inspected the Property. The Property was unlivable, it was infested with termites, the kitchen was completely gutted, walls were torn down, windows were partially removed, and bathrooms had no fixtures.

In early February, Parker spoke on the telephone with Tim Lawson and Martin Weiss, Provident's Vice President, concerning accepting a deed in lieu of foreclosure from McClure. Neither Weiss nor Lawson gave their consent to Parker to accept a deed in lieu of foreclosure. Weiss and Lawson told Parker "they would have to get back to [him], that they couldn't make a decision."

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[3] Saddleback was also doing business as American National Mortgage and American Moneycor Funding. The Adjustable Rate Note designates American Moneycor Funding as the lender and the Deed of Trust designates American Moneycor Funding as the beneficiary. We will refer to Saddleback, American National Mortgage, and American Moneycor Funding in this opinion collectively as Saddleback.

In a letter dated February 11, 2000, Parker informed Tim Lawson of Provident he had been to the Property and it was "'gutted[.]'" Parker added: "[McClure] has agreed to give me a 'Deed in Lieu of Foreclosure' for the cost of relocating. He is about 45 days into foreclosure. I would be willing to remodel the [P]roperty and sell the [P]roperty at a Fire Sale Price, to pay off Provident . . . . I have an active California General Contractors license and twenty years of remodeling experience. I believe I can get the [P]roperty remodeled and sold in 90 days, at an estimated cost of $35,000. Which I am willing to put up. If the [P]roperty was sold in its current condition it would bring about [$]130,00.00, far short of the note and interest owed to Provident. [¶] *It is [Saddleback]'s and my sincere request that we be allowed to repay the warehouse line through the scenario I have stated above*. If Provident . . . elects to take the loans and collateral through the UCC filing process, more time will go by before anything is accomplished with [the Property]. . . . [¶] Please review our request with your senior staff and let us know as soon as possible how you wish to proceed." (Italics added.) Provident disputed receiving this letter.

In a letter dated February 14, 2000, Provident's Corporate Counsel's office demanded Saddleback repay the loan within 10 days. In a letter dated March 14, 2000, Provident notified Saddleback that it was in default of the Agreement, and Provident was going to sell the loan at a Uniform Commercial Code (UCC) sale on March 24, 2000. Accompanying the letter was a notice, bid procedures, and qualifications for the UCC sale.[4] Saddleback disputed receiving either letter.

[4] There was a discrepancy concerning the date of the UCC sale. The letter stated the sale would be held on March 24, 2000, and the accompanying documents stated the sale would be held on March 28, 2000.

On March 28, 2000, after receiving no bids, Provident purchased the loan for $180,028.02.[5] On March 29, 2000, McClure executed a Deed in Lieu of Foreclosure (Deed in Lieu of Foreclosure) transferring title to the Property to Saddleback in exchange for $2,500.[6] In May of 2000, Saddleback began to repair the Property. After Saddleback spent approximately $15,000 on repairs, Parker realized it was going to cost another $60,000 to complete the repairs and get the Property in sellable condition.

On May 3, 2000, the Deed in Lieu of Foreclosure was recorded.[7] On May 10, 2000, Provident recorded an Assignment of Mortgage/Deed of Trust[8] from Saddleback; it was executed on April 25, 2000.[9]

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[5] Weiss testified Provident's nonconforming division purchased the loan from Provident's warehouse division. The warehouse division settled the receivable on its books and the nonconforming division created the receivable on its books.

[6] Saddleback also received a quitclaim deed for the Property. Parker testified the quitclaim deed came from McClure's son, James H. McClure III. When Parker went to see the Property, McClure's son was there, and Parker stated, "'well, you know, I thought we made a loan to the doctor, your dad.' And [McClure's son] said, 'well, you did, but I signed for him [pursuant to a power of attorney].'" McClure's son was in possession of the Property, and Saddleback paid him $2,500 to vacate the Property.

[7] The Deed in Lieu of Foreclosure in the Appendix in Lieu of Clerk's Transcripts does not indicate when it was recorded. Saddleback's witness, J. F. Morrow, testified it was recorded May 3, 2000.

[8] The legal description of the Property, as contained in Exhibit A to that certain Assignment of Mortgage/Deed of Trust recorded on May 10, 2000, in the Official Records of the Los Angeles County, California Recorder's Office as Instrument No. 00 0718893 is as follows: "Lot 13 of Tract 16439, in the City of Lakewood, County of Los Angeles, State of California, as per map recorded in Book 393 page(s) 32 to 34 inclusive of maps, in the office of the County Recorder of said County. [¶] Except all oil, gas and other hydrocarbon substances in and under or that may be produced from a depth below 500 feet below the surface of all of said land without right of entry upon the surface of all of said land without right of entry upon the surface of any of said land for the purpose of mining, drilling, exploring or extracting such oil, gas and other hydrocarbon substances or other use of or rights in or to any portion of the surface of said land to a depth of 500 feet below the surface thereof, but with the right to drill into, locate

In a letter dated June 5, 2000, Saddleback's attorney told David Graves of Provident that after "Mr. McClure" defaulted, he "deeded" the Property to Saddleback in exchange for $2,500. Saddleback acquired title to the Property in this manner to avoid foreclosure costs and protect Provident's interest in the Property. After informing Graves of the Property's condition and the cost of repairs, Saddleback's attorney stated: "Saddleback . . . intends to honor its obligations to Provident and will do all that is necessary to protect Provident's interest without any additional cost or risk. With that intent, Saddleback . . . makes the following proposal: [¶] 1. That Saddleback . . . retains title to the [P]roperty; [¶] 2. Saddleback provides to Provident a new deed of trust securing Provident's interest in the [P]roperty subject only to any construction financing required to complete the renovation; [¶] 3. Saddleback contracts for the renovation of the [P]roperty; [¶] 4. Saddleback acquire any construction financing necessary to complete the renovation; [¶] 5. Upon completion of the renovation, the [P]roperty shall be placed on the market to be sold no later than August 31, 2000. The sale price will not be less than the total of all encumbrances on the [P]roperty. Should the [P]roperty not be in a viable escrow by the expiration date, the [P]roperty shall be transferred to Provident. [¶] The foregoing proposal provides for a mechanism that will not only protect

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wells and produce oil, gas and other hydrocarbon substances from any portion of said land which lies below 500 feet from the surface thereof, as reserved in the deed from Montana Land Company, recorded January 27, 1950 in Book 32094, Page 1, of Official Records." Exhibit A to that document identifies the assessor parcel number as 7174-030-008.

[9] The assignment Provident recorded was different from the June 16 Assignment. At trial, Weiss could not explain what happened to the June 16 Assignment. Weiss executed the April 25, 2000, Assignment of Mortgage/Deed of Trust on behalf of Saddleback because Saddleback was not cooperating and Provident had a limited power of attorney pursuant to the Agreement. Weiss testified Provident did not record the June 16 Assignment because loans are usually sold to an end investor and recordation affects marketability. Provident recorded the April 25, 2000, assignment because it bought the loan at the UCC sale.

Provident's interest, but will enhance the value of the collateral and minimize any potential loss without the necessity of costly and time consuming alternatives. [¶] Should the foregoing not be acceptable, please advise of what additional concerns Provident may have and we will try to address them."

In early June of 2000, Provident's corporate counsel, Deanna Gossett, had a telephone conversation with Ragsdale in which they discussed the following two options: (1) Saddleback would transfer title to the Property to Provident to satisfy the loan; or (2) Provident would provide Saddleback with additional financing to repair the Property. Gossett refused title to the Property because it would not satisfy the loan, and she refused additional financing because of the risk. Gossett denied ever seeing the letter Ragsdale sent Graves on June 5, 2000.

In June of 2000, Scott, a licensed but at the time inactive California attorney, loaned Saddleback $60,000 evidenced by a Promissory Note and secured by a Deed of Trust and Absolute Assignment of Rents on the Property.[10] Scott recorded the deed of trust on June 28, 2000.[11] Saddleback completed the repairs to the Property in October of 2000 and listed it for sale.

In January of 2001, Saddleback received a written offer to purchase the Property for $272,000. Provident filed an action to quite title and recorded a lis pendens, which was eventually expunged, that prevented escrow from closing. However,

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[10] Parker and his wife executed the Promissory Note individually and on behalf of Saddleback. They executed the Deed of Trust and Absolute Assignment of Rents only on behalf of Saddleback. Scott testified Parker also executed a second deed of trust on his personal residence as collateral. Scott foreclosed on Parker's residence, but he did not receive a trustee's deed upon sale.

[11] The Deed of Trust does not indicate when it was recorded, although it does bear a recorder's instrument number. The June 28, 2000, date was found on Scott's Notice of Default and Election to Sell Under Deed of Trust and Notice of Trustee's Sale Under Deed of Trust.

Saddleback signed amended escrow instructions conditioning the sale of the Property on Provident's approval. Provident prevented escrow from closing because Scott would have been paid in full first and Provident would have received the net proceeds.

In May of 2001, Provident filed a first amended complaint against Scott and Saddleback for quiet title and Saddleback for, among other things, breach of contract, breach of fiduciary duty, promissory fraud, and money lent.[12] Saddleback filed a cross-complaint against Provident for slander of title and abuse of process.[13]

Saddleback eventually defaulted on the loan from Scott, and in September of 2001, Scott commenced foreclosure proceedings. On February 8, 2002, Scott obtained a Trustee's Deed Upon Sale for the Property identifying his interest as a second position trust deed.

In April of 2003, following a bench trial, the trial court issued a tentative statement of decision. Provident objected, and in the court's statement of decision, it overruled Provident's objections and adopted its tentative statement of decision as its ruling. The court entered judgment in favor of Scott and Saddleback on Provident's quiet title action.[14]

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[12] The parties settled the promissory fraud claim.

[13] This lawsuit involved another loan. Saddleback loaned Mark Hernandez $193,704. Saddleback admitted it failed to repay Provident for the Hernandez loan and it is not part of this appeal.

[14] The trial court ruled in favor of Provident on its causes of action against Saddleback for breach of contract and money lent in the amount of $374,940 (the sum of the McClure and Hernandez loans) plus accrued prejudgment interest in the amount of $112,347.02, for a total of $487,287.02 plus postjudgment interest and costs. The court's award of principal and accrued interest was the remedy provided for in the Agreement. The court ruled in favor of Saddleback on Provident's cause of action for breach of fiduciary duty. Finally, the court ruled in favor of Provident on Saddleback's causes of action for slander of title and abuse of process.

In its statement of decision, the trial court made numerous factual and legal findings. We recite two of those legal findings in their entirety because they are relevant to this appeal. As to the breach of fiduciary duty action, the court stated: "The Court finds against Provident and in favor of Saddleback on this claim. Under the . . . Agreement, Saddleback had a clear duty to preserve and protect the [P]roperty that was securing the McClure Loan. It was clear to Saddleback that the condition of the [P]roperty would only deteriorate if it allowed . . . McClure to stay in possession. Saddleback advised Provident of the condition of the [P]roperty and its *intent* to accept a deed in lieu. There was no objection by Provident. If Provident had a problem with Saddleback's strategy, it should have said something to Saddleback at the time. It is simply too late now for Provident to object to the deed in lieu after the parties have spent months and thousands of dollars relying on Provident's silence as an approval of the strategy." (Italics added.)

With regard to the quiet title action, the trial court found:

"The Court finds against Provident on this claim. As stated above, Saddleback lawfully accepted a deed in lieu from McClure. When Saddleback accepted the deed in lieu, it extinguished not only Saddleback's lien against the [P]roperty, but also any lien that Provident had against the [P]roperty. See . . . Civil Code Section 2910. The Court also finds that it would be inequitable to allow Provident to retain an interest in the [P]roperty. Provident had no objection to Saddleback accepting the deed in lieu, and it allowed Saddleback and . . . Scott to invest thousands of dollars in refurbishing the [P]roperty over a [nine] month period.

"The Court also finds that Provident's purported UCC sale is of no legal consequence. The Court does not believe that Provident actually completed the UCC sale, but even if Provident did complete the UCC sale, the Court finds that Provident should be estopped from asserting that it did. First, Provident never sent the notice of the purported UCC sale to the correct address for Saddleback under the . . . Agreement.

Second, Provident never gave any notice of the purported sale to . . . McClure. Third, Provident never made any UCC filing before or after the purported sale to legitimate or validate the sale. And fourth, Provident never acted as if it had actually conducted the sale. Indeed, Provident never said anything to anyone about the purported sale until the eve of trial, after thousands of dollars had been invested in the [P]roperty to refurbish it and after the parties had spent months litigating the case and been involved in extensive discovery and law and motion. Finally, even if Provident conducted a valid UCC sale and obtained a lien against the [P]roperty, that lien was extinguished when Saddleback accepted the deed in lieu from . . . McClure."

DISCUSSION

To prevail on an action to quiet title, the plaintiff must prove it owns the property or has some other title or interest in the property and the defendant has no right or title in the property adverse to the plaintiff's rights. (Code Civ. Proc., § 761.020.) "A quiet title action seeks to declare the rights of the parties in realty. . . . [Citations.] . . . '"The object of the action is to finally settle and determine, as between the parties, all conflicting claims to the property in controversy, and to decree to each such interest or estate therein as [it] may be entitled to."' [Citations.]" (*Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278, 305.) Generally, a quiet title action is equitable in nature and, therefore, is triable by a judge and not a jury. (*Estate of Phelps* (1990) 223 Cal.App.3d 332, 340; Code Civ. Proc., § 764.010.)

Whether Provident has an interest in the Property depends on the effect of Saddleback's acceptance of the Deed in Lieu of Foreclosure from McClure. Provident retained an interest in the Property only if the Deed in Lieu of Foreclosure did not extinguish any interest it may have possessed via the June 16 Assignment or its purported UCC sale on March 28, 2000.

Substantial evidence supported the trial court's finding Saddleback adequately informed Provident it intended to accept the Deed in Lieu of Foreclosure from

McClure and Provident consented. We agree with the court that Provident should be estopped from contesting the validity of the Deed in Lieu of Foreclosure. We also agree with the court that any interest Provident possessed prior to March 29, 2000, was extinguished when Saddleback accepted the Deed in Lieu of Foreclosure from McClure.

1. Saddleback Informed Provident of Plan to Accept Deed in Lieu of Foreclosure

A deed in lieu of foreclosure is a deed given by a trustor to the beneficiary to avoid the inconveniences of foreclosure. The transfer of title to the party holding a lien on that title destroys the lien. Therefore, the beneficiary takes title to the property free and clear of its former lien. (Bernhardt, Cal. Mortgage and Deed of Trust Practice (3d ed. 2000) § 7.2, pp. 474-475; see *Hamud v. Hawthorne* (1959) 52 Cal.2d 78, 83.) "A security interest cannot exist without an underlying obligation, and therefore a mortgage or deed of trust is generally extinguished by either payment or sale of the property in an amount which satisfies the lien. [Citations.]" (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1235.) "The sale of any property on which there is a lien, in satisfaction of the claim secured thereby . . . extinguishes the lien thereon." (Civ. Code, § 2910.)

The trial court found Saddleback advised Provident and obtained consent to accept the Deed in Lieu of Foreclosure. Provident raises several challenges to this conclusion in a veiled attempt to retry the case. None of its contentions have merit.

The trial court's statement of decision included numerous factual and legal findings. With respect to the Deed in Lieu of Foreclosure, the court found that "On or about February 11, 2000, Saddleback *advised* Provident *in writing and by telephone* that it was intending to accept a deed in lieu of foreclosure from . . . McClure so it could prevent further deterioration of the [P]roperty and start refurbishing it right away. Provident voiced no objection to Saddleback's plans. Accordingly, the deed in lieu was accepted by Saddleback from . . . McClure on March 29, 2000." (Italics added.)

Provident disputes it was ever advised of Saddleback's intention to accept the Deed in Lieu of Foreclosure to prevent further deterioration of the Property. Provident acknowledges Parker's testimony the Deed in Lieu of Foreclosure was discussed in a letter and over the telephone, but nevertheless asserts the evidence was inadequate to prove this point.

Beginning with the February 11, 2000, letter, Provident argues it merely conveyed McClure's willingness to give Saddleback the Deed in Lieu of Foreclosure and Parker failed to explicitly state he intended to accept the Deed in Lieu of Foreclosure. This is but one interpretation to be given to the letter. We are not the trier of fact, and as discussed, the scope of our review is limited. We do not find the court's contrary interpretation of the letter to be unreasonable or irrational.

In the letter, Parker stated a remodel of the "gutted" Property was necessary for it to be sold for enough money to repay the money owed to Provident. Parker personally guaranteed he was up to the task by mentioning his general contractor's license and years of remodeling experience. He provided a specific plan to obtain the Deed in Lieu of Foreclosure, remodel, and sell the Property within 90 days. He explained if he did not obtain the Deed in Lieu of Foreclosure and the Property was sold in its current condition, there would not be enough to repay the money owed to Provident. Based on Parker's clear desire to pay off the entire loan, and limited options with respect to the Property, he effectively conveyed his plan of action (which included his intention to obtain the Deed in Lieu of Foreclosure) to Provident.

Moreover, the trial court heard Parker's testimony regarding his telephone conversations with principals at Provident regarding his plans to repay the loan (which necessarily included his intention to obtain the Deed in Lieu of Foreclosure). Provident argues the court could not have possibly found Parker's testimony credible. Relying on the testimony and evidence presented by its witnesses, Provident argues Parker had no grounds to reasonably believe he could obtain the Deed in Lieu of Foreclosure. It claims

Parker understood Provident objected to Parker's plan when Provident advised it would "get back" to him and it did not acquiesce by silence.

"Where the evidence conflicts or is capable of conflicting inferences, the appellate court will not substitute its deductions for those of the fact finder. [Citation.] Further, although appellant repeatedly contests the weight and credibility of the testimony presented, this court will not reweigh evidence, reappraise the credibility of witnesses, or resolve factual conflicts contrary to the trial court's findings, but will only decide whether there is substantial evidence to support these findings. [Citation.]" (*Eidsmore v. RBB, Inc.* (1994) 25 Cal.App.4th 189, 195.)

This court had no opportunity to observe the targeted witnesses and the "cold record" gives us no real insight into the credibility of their testimony. Our record does not reflect the witnesses' emotional state, demeanor, or mannerisms while testifying. It is well settled that credibility is a determination left to the trier of fact. (*Lenk v. Total-Western, Inc.* (2001) 89 Cal.App.4th 959, 968.) The trial court was free to accept Parker's version of events and reject the story given by Provident's witnesses. The record supports the trial court's conclusion. Parker reasonably believed Provident never unequivocally objected to his plan and because time was of the essence he obtained the Deed in Lieu of Foreclosure to protect the Property.

2. Estoppel

Provident claims the trial court erred when it found Provident was "legally estopped from contesting the validity" of the Deed in Lieu of Foreclosure because the court's finding was not "supported by the record or the law." Relying on *Nicolopulos v. Superior Court* (2003) 106 Cal.App.4th 304 (*Nicolopulos*), Provident argues the court erroneously held Provident was estopped from challenging the validity of the Deed in Lieu of Foreclosure. We disagree.

"Estoppel is applicable 'where the conduct of one side has induced the other to take such a position that it would be injured if the first should be permitted to

repudiate its acts.' [Citation.] To establish a defense of equitable estoppel, four elements must ordinarily be proved: '"(1) The party to be estopped must know the facts; (2) [it] must intend that [its] conduct shall be acted upon, or must so act that the party asserting the estoppel had the right to believe that it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; and, (4) [it] must rely upon the conduct to [its] injury." . . .' [Citations.]" (*Nicolopulos, supra,* 106 Cal.App.4th at p. 311; Evid. Code, § 623.) The party asserting the defense of estoppel must establish each of its elements. (*Nicolopulos, supra,* 106 Cal.App.4th at p. 311.)

"[T]he 'existence of an estoppel is generally a question of fact for the trial court whose determination is conclusive on appeal unless the opposite conclusion is the only one that can be reasonably drawn from the evidence. [Citation.] When the evidence is not in conflict and is susceptible of only one reasonable inference, the existence of an estoppel is a question of law. [Citation.]' [Citation.]" (*Gyerman v. United States Lines Co.* (1972) 7 Cal.3d 488, 499.) Because the facts in this case are disputed, estoppel was a question of fact for the trial court and our inquiry is substantial evidence review. (*San Diego Metropolitan Transit Development Bd. v. Handlery Hotel, Inc.* (1999) 73 Cal.App.4th 517, 528.)

Provident argues it informed Parker it was *considering* his offer, and therefore, Saddleback knew it had not consented to accepting the Deed in Lieu of Foreclosure. Provident also contends Saddleback was not ignorant of the facts because Parker knew Provident's consent was required for accepting the Deed in Lieu of Foreclosure.

We find substantial evidence supported the trial court's finding Provident's silence was an implicit approval of Saddleback's plan to accept the Deed in Lieu of Foreclosure. "While an estoppel may arise from silence, there must be a duty to speak[.]" (*Nicolopulos, supra,* 106 Cal.App.4th at p. 311.) The record shows Provident had a duty to speak.

In his February 11, 2000, letter, Parker detailed his plan for repairing the Property, selling it, and repaying Provident. He stated, "It is [Saddleback]'s and my sincere request that we be allowed to repay the warehouse line through the scenario I have stated above. . . . [¶] *Please review our request with your senior staff and let us know as soon as possible how you wish to proceed*." (Italics added.) Parker admitted Provident's consent was required to accept the Deed in Lieu of Foreclosure, and he admitted neither Weiss nor Lawson consented. Parker conceded he never thought to get Provident's consent in writing, but he testified, "I – I asked them if they would object to it, and I never did get an answer, and time was running out."

Provident had a duty to speak and because they were silent, they impliedly consented to Parker's plan. Provident knew Saddleback was about to repair the Property at its expense to protect Provident's interest in the Property and repay the loan. Parker asked Provident to let him know as soon as possible how they wanted him to proceed because he wanted to repair the Property before it deteriorated any further. Provident's only response was the February 14, 2000, letter demanding payment. This letter cannot be construed as a rejection of Parker's recommendation to accept the Deed in Lieu of Foreclosure because demanding payment was not inconsistent with Saddleback's acceptance of the Deed in Lieu of Foreclosure. Saddleback was obligated to repay Provident pursuant to the Agreement regardless of what happened to the Property.

3. Provident's Interest in the Property after the Deed in Lieu of Foreclosure

Provident also argues Saddleback's acceptance of the Deed in Lieu of Foreclosure from McClure did not extinguish its "[s]enior [r]ecorded [i]nterest [i]n [t]he [P]roperty." Specifically, Provident claims: (1) Saddleback's acceptance of the Deed in Lieu of Foreclosure violated the Agreement and, therefore, was a void instrument; (2) Provident's obtained all of Saddleback's rights to the collateral when it purchased the loan at the UCC sale; and (3) assuming Saddleback obtained title through the Deed in

Lieu of Foreclosure, Provident retained an interest in the Property pursuant to the Agreement. None of these contentions have merit.

First, Saddleback's acceptance of the Deed in Lieu of Foreclosure from McClure did not violate the Agreement. Provident cites to that portion of the Agreement prohibiting Saddleback from disposing of the collateral, i.e., the promissory notes and deeds of trust. The trial court found Saddleback advised Provident it was going to accept the Deed in Lieu of Foreclosure from McClure, and Provident's silence was an implied consent. In effect, they modified the Agreement. Additionally, the Agreement required Saddleback to protect the Property. Saddleback's plan to obtain the Deed in Lieu of Foreclosure and repair the Property satisfied this provision. We cannot say the exercise of that duty violated the very Agreement that required it. In fact, if Saddleback had not done so, it would have violated this provision.

Second, relying on California Uniform Commercial Code sections 9617, subdivision (a), and 9627, subdivision (b)(2), Provident argues the UCC sale was a commercially reasonable disposition of the collateral and Provident acquired all of Saddleback's rights to the collateral. However, Provident ignores the trial court's finding it should be estopped from claiming it completed the UCC sale. The court found Provident did not notify Saddleback or McClure of the UCC sale, record the appropriate UCC sale notice, or act as if it ever completed the sale. Because Provident does not explain how the court erred in finding Provident was estopped from asserting it completed the UCC sale, we need not address whether it was commercially reasonable. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785.)

Third, Provident argues any title Saddleback obtained by accepting the Deed in Lieu of Foreclosure was being held in trust for and pre-pledged to Provident pursuant to the Section XI of the Agreement. Section XI states: "To secure all loans, advances and other amounts owing at any time under this Agreement . . . , [Saddleback] hereby pledges, assigns, transfers and grants a first perfected security interest in the

following described collateral to [Provident] . . . : [¶] (a) All of [Saddleback's] right, title and interest in and to the promissory notes, mortgages, deeds of trust, . . . title, . . . and all other rights . . . procured by [Saddleback] . . . ; [¶] . . . [¶] (g) All of [Saddleback's] right, title, and interest in and to all other collateral assigned to [Provident]."

The Agreement required Saddleback to assign its interest in the Property to Provident. Saddleback initially assigned its interest in the Property to Provident via the June 16 Assignment. After Saddleback accepted the Deed in Lieu of Foreclosure and Provident's interest in the Property was extinguished, Saddleback did not assign its interest in the Property to Provident. This was the basis for the breach of contract claim. Provident prevailed on this cause of action and was awarded $487,287.02 plus postjudgment interest and costs. The award did not vest Provident with an interest in the Property. Without an interest in the Property, Provident had no basis to quiet title.

Finally, Provident urges that when McClure gave Saddleback the Deed in Lieu of Foreclosure, it extinguished, at most, McClure's obligations to Saddleback. However, Provident insists it could not by operation "extinguish Provident's interest in the Property." Provident cites no case to support this proposition and our research uncovered none. To the contrary, it is well settled when a deed in lieu of foreclosure of a deed of trust is given "the beneficiary takes title [to the property] free and clear" of the lien. (Bernhardt, Cal. Mortgage and Deed of Trust Practice, *supra*, § 7.2, pp. 474-475.) Therefore, Saddleback's acceptance of the Deed in Lieu of Foreclosure extinguished Provident's interest in the Property.

4. Was Scott a Bona Fide Encumbrancer?

Provident claims Scott was not a bona fide encumbrancer because he had actual notice of Provident's prior interest in the Property and he did not inquire about title to the Property. Because we find Saddleback's acceptance of the Deed in Lieu of

Foreclosure extinguished Provident's interest in the Property, we need not address this claim.

DISPOSITION

The judgment is affirmed. Respondent is awarded its costs on appeal.

O'LEARY, J.

WE CONCUR:

SILLS, P. J.

MOORE, J.